IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 510

KARL MULLER, FRANK KISSEL,
and HARRY STUBACK,

Petitioners,

—against—

THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT.

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No.

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—against—

THE STATE OF NEW YORK,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT.

Petitioners, Karl Muller, Frank Kissel, and Harry Stuback, respectfully pray that this Court issue a Writ of Certiorari to the New York Supreme Court, Appellate Division, First Department, to review its affirmants of a judgment of the New York Supreme Court, County of New York, which convicted each defendant of the crimes of extortion, attempted extortion, and conspiracy, after trial before Gellinoff, J., and a jury. Concurrent sentences were imposed for the various crimes so that in effect Petitioner,

Muller, is serving three and a half to seven years imprisonment; Petitioner, Kissel, is to be incarcerated for seven and a half to fifteen years, while Petitioner, Stuback, will have to serve five to ten years.

Opinion Below

There was no opinion rendered by the New York Supreme Court, Appellate Division, First Department.

Jurisdiction

The jurisdiction of this Court is invoked under Title 28 United States Code, Sec. 1253. The Court of Appeals of the State of New York denied leave to appeal on May 5, 1970 and denied reargument on June 22, 1970. (See Appendices A and B). The order of the Appellate Division is at Appendix C.

Questions Presented

1. Whether the Petitioners were denied their constitutional rights under the Fourth, Fifth, Sixth and Fourteenth Amendments by virtue of the employment of wiretapping and eavesdropping in connection with the investigation leading up to the indictment herein?

2. Whether inordinant pre-trial publicity violated the Petitioners' constitutional rights under the Fourteenth Amendment to a fair trial?

3. Whether Petitioners received a fair trial under the Fourteenth Amendment in view of the fact that there was insufficient evidence as a matter of law to warrant a conviction for extortion under its definition pursuant to the New York statutes (compare sections 380(2) and 850, N.Y. Penal Law)?

Constitutional and Statutory Provisions Involved

The Fourth, Fifth, Sixth and Fourteenth Amendments of the United States Constitution are herein involved.

In addition, Sections 605 and 501 of the Federal Communication Act are also involved (47 U.S.C. Sec. 605, 501).

Article 1, Section 12 of the New York Constitution and Section 813(a) and Section 249 of the New York Code of Criminal Procedure, as well as Sections 738, 740 of the New York Penal Law and Sections 250.00, and 250.05 of the Revised New York Penal Law are, also germane.

Statement of the Case

The prosecution relied solely upon the crime of "extortion" under Sections 850 of the Penal Law, since as a matter of due process of law and as a matter of New York evidence, no conviction could be predicated upon the companion statute, namely Section 380(2) of the Penal Law involving bribery. The witnesses who testified against the Petitioners herein would all have been accomplices as a matter of law and thus no conviction could be obtained as a result of their uncorroborated testimony. (Section 399 of the Code of Criminal Procedure). Only bribery, not extortion, was proved.

The District Attorney frankly conceded that extensive electronic surveillance was conducted in connection with the investigation of the Petitioners herein. At no time was any Court Order introduced authorizing such surveillance. Some of this electronic surveillance was of the trespassory eavesdropping type, that is, "bugs" or listening devices were placed in the premises being used by the Petitioners for the conducting of their normal business.

The Petitioners herein were the president, secretary and vice-president, respectively, of Local 174 of the Amalgamated Meat Cutters Butchers Workmen of North America.

It was alleged that in connection with negotiations seeking to arrive at a contract in 1964, the Petitioners "extorted" $60,000.00 from the victims, namely, about fifteen or so of about 45 meat packers with whom the contract was being negotiated.

The labor committee of the Meat Trade Institute was negotiating this contract.

One of the essential elements of finding a conviction under Section 850 of the New York Penal Law is that *payment* must be "*induced* by a wrongful *use of force or fear*".

Every single witness who alleged that money had been paid to the defendants herein, confirmed that none of this money had been turned over until *after* a contract with the union had already been approved and ratified by the union itself by a vote of approximately 4,000 to 6.

Thus, it is urged that as a matter of law there could not have been any "force or fear" used in connection with the payment of this money since the alleged threat was that no contract would ever be approved unless and until the $60,000.00 was paid.

It was undisputed that Petitioner, Frank Kissel, at one point said with respect to the alleged $60,00.00, "You can shove it up your ass". (A271)*

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* Numerals in parenthesis refer to pages of the appendix used in the Court below unless otherwise indicated.

A perusal of the record will indicate that the money was apparently paid, at least in part, but that it was *given as a "bribe" and not under the force or fear necessary to make it "extortion"*.

POINT I

The District Attorney admitted that extensive electronic surveillance took place in connection with the investigation of the petitioners. Furthermore, it was conceded that much information about the petitioners was thus learned. No court orders were introduced, nor were any of the tapes themselves introduced into evidence. This violated the petitioners' rights under the Fourth, Fifth, Sixth and Fourteenth Amendments, as well as under similar statutes and constitutional provisions in the State of New York.

During the trial, the assistant District Attorney in charge openly admitted (A35):

> "The eavesdropping was extensive and it took place over some period of time over many locations, which I would like to list for the record, and although it was productive in some other areas, it had nothing to do with this indictment."

At another point the District Attorney admitted:

> Mr. Scopetta: That's right, Judge, yes unquestionably. The officers I would say undoubtedly made use of these wiretaps to keep track of defendants. They heard it, they may have been there, but I'm saying no observations were made of these defendants that affect this case."

It was the position of the District Attorney that since none of the tapes themselves were introduced into evidence, that therefore there was no prejudice to the Petitioners.

This, of course, completely overlooked the doctrine of "fruits of the poisonous tree" (*Nardone* v. *United States*, 308 U.S. 338).

In *Lee* v. *Florida*, 392 U.S. 378, the Supreme Court of the United States indicated that only by prohibiting the use of the evidence directly and indirectly, could respect be obtained for the statutes of the United States. The electronic surveillance in this case unquestionably was in violation of Sections 605 and 501 of title 47 of the United States Code. In other words, it *constituted a federal crime.* It should be further noted that *the mere revelation of the fact that electronic surveillance, namely wiretapping, took place is sufficient to invoke the penalties of that statute.* The disclosure of the existence of electronic surveillance through wiretapping constitutes a violation of the statute.

Motions had been made to dismiss the indictment based upon this, but of course they were denied.

On the issue of "standing", see *Mancusi* v. *DeForte*, 392 U.S. 364. The petitions have standing.

It should be noted that it is the "possibility" of prejudice that controls and not actually a demonstration that unequivocal prejudice was wrought by the electronic surveillance. (See *Chapman* v. *California*, 386 U.S. 18, 24). *Chapman* is important from the standpoint of recognizing that the District Attorney admitted that electronic surveillance of a substantial nature occurred and that it enabled the police authorities to keep track of the defendants. The gratuitous statement by the assistant District Attorney that the observations did not affect "this case" are not conclusive. The Court should have granted the motion to dismiss the indictment. For example, the testimony of Special Agent Pennypacker of the F.B.I. in *United States* v. *Black*,

C.R. Nos. 551-63, 650-63, D. C. December 18, 1967, transcript page 610, reveals the following which is very significant herein:

> "... during the course of the investigation I might send a lead out to an office and make reference to the fact previously it had been determined from several sources. One of the sources would be microphone surveillance; that a given named individual had been associated with Mr. Black, because this was my area of investigation ... Consequently, the course of my information ... would be from several sources including microphone surveillance and it would become commingled with other information. My purpose in sending leads out in the first place would be to identify individuals which I have no identity for or I wanted to get additional background ... so it would be a situation where I would be anxious and interested."

In addition, there is no getting around the fact that the activities of the law enforcement agencies constituted a clear and unequivocal violation of a federal statute, namely, title 47 U.S.C. Sections 605 and 501; *Lee* v. *Florida*, 392 U.S. 378.

In *Nardone* v. *United States*, 308 U.S. 338, the Court made it clear that not only was direct evidence of electronic surveillance to be suppressed, but "fruit of the poisonous tree" doctrine also required that all indirect evidence obtained must also be barred. Thus in the *Nardone* case, the Court explained:

> "To forbid the direct use of methods ... but to put no curb on their full indirect use would only invite the very methods deemed 'inconsistent with ethical standards and destructive of personal liberty'."

The argument is further bolstered by the opinion in the *Lee* case where the Court further held:

> "But the decision we reached today is not based upon language and doctrinal symmetry alone. It is buttressed as well by the 'imperative of judicial integrity'. Elkins v. United States, 364 U.S. 206, 222 . . . Under our Constitution, no Court, State of federal, may serve as an accomplice in the wilful transgression of the 'laws of the United States', laws by which 'the Judges in every State (are) bound. . . .'"

It is therefore quite manifest that the only way that the Court could have enforced these mandates was by preventing the prosecution altogether, that is, to have eliminated itself as an accomplice in the commission of the federal crime which had undoubtedly been perpetrated by the law enforcement authorities.

This Court should now grant certiorari and reverse the judgment in order to enforce the doctrine explained above.

POINT II

Inordinate pretrial publicity permeated the pre-trial atmosphere in this case and it was error, as a matter of law, reaching constitutional dimensions for the trial court to have denied a continuance.

Prior to trial, there had been substantial publicity which, it is submitted, precluded a fair trial. This publicity dealt not only with the generic subject of the meat industry, but specifically referred to fraudulent and criminal practices involving at least one or more of the witnesses who were later to testify at this very trial.

In addition to that fact, the Court also was shown a number of the articles and was asked to grant a continuance in order to ameliorate and attentuate the virulence of this publicity. (The records of the State Court confirm the fact).

The cases are legion that such a trial atmosphere precludes fair and impartial consideration of the facts by a trial jury.

On a number of occasions, the Courts have held that the only sensible and proper procedure to even attempt to reduce the damaging consequences of this publicity, is to adjourn the trial until things have "simmered down". A continuance was denied.

See *Sheppard* v. *Maxwell*, 384 U. S. 333;
Irvin v. *Dowd*, 366 U. S. 717;
Estes v. *Texas*, 381 U. S. 532; and
Rideau v. *Louisiana*, 373 U. S. 723.

We would ask this Court to also review this aspect of the case as raising a Federal Constitutional question.

Under the circumstances, it is submitted that a fair trial was impossible.

POINT III

The petitioners herein were convicted of violating Section 850 of the New York Penal Law. The only evidence, however, admissible against them established a violation of Section 380(2) of the Penal Law and accordingly, the conviction, resting upon no competent evidence, is unconstitutional.

The petitioners herein were charged with the violation of New York statute forbidding extortion, namely, Section

850 of the Penal Law. In order to convict them of this crime, the District Attorney was required to establish that the money alleged to have been paid herein, was paid under the compulsion of "force or fear". This, it is submitted, the District Attorney was unable to do since it is undisputed that the alleged "force or fear" employed herein was that no contract between management and the Union would be approved by the Union until the money was actually paid.

The Union itself, approved the agreement by a vote of about 4,000 to 6 on June 9, 1964.

It was only *after* the approval of the contract by this overwhelming majority of the Union, that any money whatsoever was paid to the petitioners by the management committee or any of the members thereof.

The District Attorney may have proved that a "bribery" was committed under Section 380(2), but in the case of bribery, the "victims" are accomplices as a matter of law and therefore, pursuant to Section 399 of the Code of Criminal Procedure, no conviction would be possible herein, since there was no independent corroborating evidence to satisfy the mandates of Section 399 of the Code of Criminal Procedure. (See *People* v. *Feld*, 262 App. Div. 909; *People* v. *Dioguardi*, 8 N.Y. 2d 260; *Nick* v. *United States*, 122 F. 2d 660, 671 (8th Cir. 1941)).

The District Attorney admittedly used substantial electronic surveillance in this case but could not introduce this for corroborative purposes since it obviously would have constituted the commission of a Federal crime to have done so. (*Lee* v. *Florida, supra*.).

Accordingly, the District Attorney apparently decided to prosecute on the theory of extortion (Section 850 of the

Penal Law), since the victim of an extortion is not an "accomplice". The facts however, do not support this theory because no payment could have been made under the "force or fear that no contract would be approved", since *no payments* were made *until after* the Union had already approved the contract.

The convictions therefore violated due process of law under the Fourteenth Amendment because they are of insufficient factual foundation. (*Garner* v. *Louisiana*, 368 U.S. 157 (1961); *Thompson* v. *Louisville*, 362 U.S. 199, 80 A.L.R. 2d 1355; *Johnson* v. *Florida*, 391 U.S. 596.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted:

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APPENDIX A

Certificate Denying Leave

STATE OF NEW YORK
COURT OF APPEALS

Before:

HON. ADRIAN P. BURKE,
Associate Judge.

THE PEOPLE OF THE STATE OF NEW YORK,
Respondents,

—against—

KARL MULLER, FRANK KISSEL and HARRY STUBACK,
Defendants-Appellants.

I, ADRIAN P. BURKE, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above named appellant for a certificate pursuant to § 520 of the Code of Criminal Procedure, and upon the record and proceedings herein, there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at New York City, New York
May 5th, 1970

ADRIAN P. BURKE
Associate Judge

APPENDIX B

STATE OF NEW YORK
COURT OF APPEALS

June 22, 1970.

Irving Anolik, Esq.,
225 Broadway,
New York, N. Y. 10007
Dear Mr. Anolik:

Re: People v. Carl Muller,
Henry Stuback and Frank
Kissel

I hereby deny your application for reargument and reconsideration of your application for leave to appeal in the above entitled matter. I considered your argument that the case involved a federal constitution question.

Very truly yours,

ADRIAN P. BURKE
Associate Judge

APPENDIX C

Order

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 24th day of March, 1970.

Present:

HON. SAMUEL W. EAGEN,
Justice Presiding.

HON. LOUIS J. CAPOZZOLI,
HON. OWEN McGIVERN,
HON. EMILIO NUNEZ,
Justices.

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

—against—

KARL MULLER, FRANK KISSEL, and HARRY STUBACK,
Defendant-Appellant.

An appeal having been taken to this Court by the defendant-appellant from the judgment of the Supreme Court, New York County rendered on April 16, 1969, convicting him of conspiracy as a Felony [Penal Law §§ 580-a and 850], Extortion (9 counts) [Penal Law § 850] and Attempted Extortion (2 counts) [Penal Law §§ 2 and 850], and said appeal having been argued by Mr. Irving Anolik, and Arnold Stream, of counsel for the appellants, and by Mr. Peter F. Schwindt, of counsel for the respondent; and due deliberation having been had thereon,

It is unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, affirmed.

ENTER:

Clerk.

PREME COURT, U. S.

FILED

SEP 5 1970

E. ROBERT SEAVER, CLERK

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Supreme Court of the United States

October Term, 1970

No. 510

CARL MULLER, FRANK KISSEL and HARRY STUBACK,

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against

THE STATE OF NEW YORK,

Respondent.

MEMORANDUM IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Statement

Petitioners Muller, Kissel and Stuback are seeking a writ of certiorari to the New York Supreme Court, Appellate Division, First Department, which unanimously and without opinion affirmed, by order of March 24, 1970, judgments of the Supreme Court of the State of New York, County of New York [GELLINOFF, J. and a jury], rendered April 16, 1969, convicting each of them, after trial, of CONSPIRACY AS A FELONY [Penal Law §§480-a and 850], EXTORTION (9 counts) [Penal Law §850] and ATTEMPTED EX-

TORTION (2 counts) [Penal Law §§2 and 850]. Karl Muller was sentenced to twelve concurrent State Prison terms of not less than three nor more than six years, and Frank Kissel to three State Prison terms of not less than three and one-half nor more than seven years and nine terms of not less than seven and one-half nor more than fifteen years, all sentences to run concurrently. Harry Stuback received three State Prison terms of three and one-half to seven years and nine terms of five to ten years, all to be served concurrently.

The Court of Appeals of the State of New York, per BURKE, J., denied petitioners' motions for leave to appeal on May 5, 1970, stating "there is no question of law presented which ought to be reviewed by the Court of Appeals."

Introduction

In late April 1964, the pork producers of New York City, some 35 to 40 in number, were advised by Local 174, Amalgamated Meat Cutters and Butchers Union, which represented their production employees, of labor's demands for a new collective bargaining agreement to become effective at the expiration of the old contract in mid-June. Shortly, having already warned the packers that a new agreement had to be reached by June 15th, the defendants, officers of the local, demanded $60,000 for themselves or there would be no contract at all. When no amount of protest availed, the members of the Labor Negotiating Committee of the Meat Trade Institute, which represented the producers, agreed. Thereafter, following ac-

ceptance by both sides of a contract which all agreed was a major union victory, but before formal signing, various packers turned over to each of the defendants varying sums of money totaling in excess of $44,000.

Accordingly, in 1967—the defendants had been successful enough to keep their victims quiet for a long while—the defendants were indicted by a New York County Grand Jury for the crimes of conspiracy to extort (Count 1) and extortion (Counts 2-14), the separate extortion counts charging the defendants with separate and distinct extortions from 13 different firms and their officers. Tried before Mr. Justice GELLINOFF and a jury in the late winter of 1969, the defendants were found guilty as charged under counts 1-3, 5-7 and 9-12, and guilty of attempted extortion under counts 4 and 8; counts 13 and 14 were not sent to the jury.

THE EVIDENCE AT TRIAL

The People's Case

The butchers union serves its demand for a new contract and the defendants refuse to extend the old contract pending the outcome of negotiations.

On June 15, 1964 three-year collective bargaining agreements between the Amalgamated Meat Cutters and Butchers Union, Local 174, and numerous pork processors located in New York City were to expire (Levy 231-2; Katz 415; Frunz 619-20; White 542-3). Accordingly, the union presented its notice of demands to the employers and on April

* Numbers preceded by names in parentheses are, unless otherwise indicated, references to page numbers prefixed by the letter "A" of the printed record on appeal.

28, 1964 the union met with management to commence negotiating a new contract (Levy 231-2; White 545-6; Trunz 620). At this meeting and at others which followed during May and June of 1964 the meat packers, some 35 in number, were represented by either the Labor Negotiating Committee or its subcommittee of the Meat Trade Institute, a voluntary trade association, one of whose principal functions was the handling of labor matters for its members (Kessler 213); the Labor Committee was composed of about a dozen executives of the larger processors and its subcommittee included four or five of its members (Levy 207-8, 234-7). The principal union spokesmen at this first meeting were its officers, the defendants, Karl Muller, President, Frank Kissel, Secretary-Treasurer, and Harry Stuback, Vice-President (Levy 229-30, 236; Katz 417; White 542; Trunz 617, 620-1). At later formal sessions defendant Muller did not appear, apparently due to illness (Levy 244-6, 266; Trunz 627-8).

At this initial meeting, held as were later ones at various Manhattan hotels (Levy 246; Trunz 627), the Institute, by its Labor Committee, sought a commitment from the union, as it had successfully done in prior years, that failure to reach accord by June 15 would not result in a work stoppage, but rather that the old contract would be extended, with the new agreement to take effect retroactively (Levy 236-7, 240; Trunz 622). The union, through defendants Muller and Kissel, refused to assent to this, asserting that an agreement would have to be reached by June 15 (Levy 241; Katz 418; White 545-6; Trunz 622). However, Kissel did request that there be at least two negotiating sessions a week in order to reach an agreement and not waste time (Katz 458).

The defendants demand $60,000 or there will be no contract, the packers protest, and a "tough" agreement is concluded.

On May 11, 1964 the Institute subcommittee met with the union; among those representing the Institute were **Lester Levy**, an officer of Plymouth Rock Provision Co. and chairman of the Labor Committee (Levy 224), **Harry R. White**, an officer of White Packing Co., whose wife's sister was married to defendant Kissel's son (White 538-41), **Charles Trunz, Jr.**, an officer of Trunz, Inc. (Trunz 626), and **Theodore Weiler**, an officer of Boar's Head Provisions Co. (Weiler 935-6; Levy 247; White 547-8; Trunz 622). During this meeting Mr. Levy, speaking privately with Kissel, told him that the union's demanded contract was "a tough one" and that competitive forces would not permit the companies to agree to it. Additionally, Mr. Levy said to Kissel that Mr. White, with whom Levy had spoken prior to the union's arrival (White 548), had informed him that the union wanted $60,000. In response to Levy's complaint that he did not know where this money was to come from, Kissel responded that that problem was up to the members of the Institute (Levy 247, 252-5, 259).

At a second management subcommittee-union meeting on May 18, 1964, Mr. Levy, prior to the arrival of the union delegates, informed **Fritz Katz**, a principal of Stoll Packing Corp. and a subcommittee member, that "they want $60,000" (Levy 255-7; Katz 421-2; Trunz 624-5). Becoming angry, Mr. Katz protested that the demand was "ridiculous" and informed Levy, despite Levy's judgment that there was nothing to be done, that he was going to try to

talk with Kissel (Katz 423; Trunz 626). Thus, when Kissel and Stuback arrived at the door to the conference room, Mr. Katz went to them and addressing Kissel angrily complained, "Frank, what do I hear there, $60,000. This is ridiculous. What kind of figure is that?" Kissel, responding with equal anger, pushed Mr. Katz aside and remarking, "Stop chiseling, your get away cheap" walked into the room (Katz 425-6; Levy 257-8; White 548-9; Trunz 626-7).

Not long after the second subcommittee-union meeting Mr. Levy sought Kissel's permission to speak personally with defendant Muller to see if Muller might be persuaded to give the Institute members "a better deal"; Kissel consented (Levy 263-5). Accordingly, Levy and Trunz went to the home of Muller in New Hyde Park and complained to him of the "rigid terms" and "stiffness" of the contract sought by the union (Levy 264-6, 270; Trunz 628-9). Muller, however, responded that Kissel was in charge of the negotiations and thus would have to make any changes in the contract demands (Levy 270; Trunz 629). Following Kissel's arrival at this meeting Levy and Trunz continued to urge modification of the union's demands, stressing particularly management's reluctance to include in the final agreement some provisions, which were ultimately in the contract, for half-day holidays on the days prior to Christmas and New Years (Levy 274; Trunz 629-30). Kissel would not concede these terms (Trunz 632). When Levy complained to the two men, "This is a very stiff contract. These are very stiff demands. And on top of that, we don't know where we're going to come up with the $60,000," Kissel concluded the meeting with the rejoinder,

"Well, you can take your money and stick it up your ass" (Levy 271; Trunz 632).

Shortly after the encounter at Muller's home and immediately following a meeting of the Institute's Labor Committee, Katz, Trunz and White conferred with defendants Kissel and Stuback over dinner at the New York Athletic Club (Trunz 635, 639; Katz 427-8; White 550-1). At this meeting Kissel, with the nodding assent of Stuback, declared that the industry was to pay the $60,000 in one "lump" prior to the signing of a contract, "otherwise there is no contract"; additionally, Kissel wanted one of the three packers who were present to collect all the money (Trunz 640-1; Katz 430-2; White 553). When the Institute members balked at individually collecting all the money Stuback seconded the demand for one payment and argued "you guys can do it" (Katz 430-2; Trunz 640-1; White 553). Finally, the three employers agreed they would do the best they could (White 553), and Katz handed Stuback a list of the meat packers who would pay and the amounts of each contribution, which had been prepared by him and Mr. White with the assistance of other Institute members (Katz 432-41; White 553-5; Trunz 642). This list, which Katz destroyed a few months after the meeting at the Athletic Club, apportioned each company's contribution to the $60,000 on the basis of its size (Katz 441-2). Defendant Stuback copied the information on this memorandum and then showed it to defendant Kissel (Katz 441-2; Trunz 642; White 553-4). All the members of the Institute were not included on the list, it consisting for the most part only of members of the Labor Committee (Trunz 643).

The Insfitute and the union orally agreed to the terms of a new contract on June 9, 1964 (Katz 460; Trunz 667). Although the union modified its demands somewhat and the final agreement reflected a few concessions on the part of the union, the eventual contract was a "tough" one for management (Trunz 664; Katz 426-7; Levy 330, 259-60). Indeed, the defendant Kissel himself told the union membership on June 9, 1964—at the meeting at which all but 6 of a few thousand members voted to accept the contract—that it was "the highest package ever received in Local 174's history" (Farrell 975-8, 981-4).

Fearing intolerable business consequences, the packers pay the defendants.

On the morning following the meeting at Muller's home in mid-May, Lester Levy of the Plymouth Rock firm informed the comptroller of his corporation, **John Gevlin,** that their share of the monies that had to be given to the union was $6,000, and asked him to make arrangements for the payment to either Kissel or Muller (Levy 275-6, 284; Gevlin 362-3). Arrangements were made through a Joe Epstein for the Stoll Packing Co., a supplier of raw materials to Plymouth Rock, to overbill Plymouth Rock in the amount of $6,000; Stoll Packing was paid by check and they in turn gave Mr. Gevlin $6,000 in cash (Gevlin 363-6; Katz 448, 464-6). The $6,000 in overbilling was added on the books of the company as though billing for merchandising actually received; in filing the company's income tax return this item was included as a business cost deduction (Gevlin 383-4). About 6 weeks after he had been told to collect the money Mr. Gevlin turned it over to Frank Kissel in the offices of Plymouth Rock (Gevlin 365-8; Levy 293-4,

312-3); Gevlin was uncertain whether this was before or after signing the contract (Gevlin 368).

During the negotiations and at the time Gevlin was directed to pay the money, Mr. Levy was afraid that if it was not paid there would be no contract and hence a work stoppage (Levy 287-9). This work stoppage would have occurred prior to the July 4th holiday, one of the industry's busiest weeks; additionally, the company having only coolers in which to store raw meat, there was danger of substantial spoilage if it wasn't processed quickly (Levy 289-90). There was also the possibility that competitors in Philadelphia might move into the New York City markets (Levy 290-1).

Fritz Katz paid his share of the $60,000—$4,000—to the defendant Kissel at a Manhattan restaurant about a week or so after June 9, 1964 (Katz 445, 449, 476) but prior to signing the printed contract on August 10, 1964 (Katz 474). At the time he was afraid that there would be a strike or labor trouble if he did not pay (Katz 446-7); he did not make the payment with any understanding that the union would lower their contract demands (Katz 510).

Katz, convicted of bribing the employee of a client, understood that although he had immunity from prosecution for the crimes revealed by his testimony, he had no immunity from perjury and that he had to answer the questions put to him (Katz 505-9).

Sometime between the end of June and the middle of July, 1964, Charles Trunz delivered $7,000 to the defendant Muller on Long Island (Trunz 644-5, 669); Trunz paid

$7000 rather than the $6000 on the Institute's list, because the defendant Kissel had asked for more (Trunz 645-7). Trunz was afraid of a strike at the time, although the defendants never said in so many words that failure to pay would result in a strike (Trunz 654-5, 674). No agreement existed between the defendants and Trunz that he would receive any special benefit for the money he gave them; nor were the union's demands lowered because Trunz gave the money (Trunz 656).

Sometime in June of 1964, Harry White turned over to the defendant Stuback his firm's share of the $60,000—$4000—in White's office in Brooklyn (White 557-8, 607, 558-60). At the time White was afraid that there would be a strike; the strike would undoubtedly have led to the destruction of a portion of his perishable inventory as well as a loss of customers to competition located in nearby cities (White 561-3). White neither asked for nor received any special benefits on the contract for the money given to the defendants (White 569-70). The $60,000 had to be paid not in order to reduce the demands on the contract, but, indeed, to get any contract at all (White 570).

Theodore R. Weiler, an officer of the Boar's Head Provision Company, was a member of the Meat Trade Institute's Labor Negotiating Committee in April, May and June of 1964 (Weiler 935-8), and was informed by Mr. Katz in about mid-May at a negotiating session in Manhattan that if "We want a contract this year we will have to pay for it"; the total amount was $60,000 (Weiler 940-1). Shortly thereafter, Katz told Weiler that his share was $6000. In July of 1964, Mr. Weiler gave $6000 in an en-

velope to Mr. Kissel at the union office on 18th Street and Irving Place (Weiler 942-3); although this disbursement was originally carried as a business expense by Boar's Head, the Internal Revenue Service later disallowed the amount as a business cost (Weiler 947-8, 960). Weiler had no agreement with anyone that the union's demands would be lowered in return for the payment of the money (Weiler 945). At the time Weiler spoke to Katz about the payment he "wanted to achieve labor peace," avoiding slowdowns or strikes (Weiler 945-6); aside from the spoilage of substantial inventory a strike would have entailed a loss of business and undefrayed overhead expenses (Weiler 946-7).

Samuel Goldman, an officer of Merkel, Inc., who had been convicted of perjury, participated with the Meat Trade Institute in negotiating a collective bargaining agreement in April, May and June of 1964; Mr. Goldman attended about 3 or 4 of the negotiating meetings (Goldman 774-7). At the conclusion of one of the negotiating meetings at a Manhattan hotel, Fritz Katz took Goldman aside and informed him that Merkel's share of the cost of obtaining the contract was to be $6000 (Goldman 780-2; Katz 447). Returning to his office, Goldman informed **Norman Lokietz**, also an officer of Merkel, that Merkel was obligated to make a payment of $6000 to Kissel and Muller to obtain a contract and Lokietz agreed to take care of it (Goldman 742-3, 783; Lokietz 814-15).

Lokietz arranged with a meat broker named Anselmo for Merkel to be overbilled in the amount of $6000; the $6000 was than turned over by Anselmo to Lokietz in cash (Lokietz 816-7); Lokietz admitted that carrying this disbursement on the books as a deductible item was fraudulent

for income tax purposes (Lokietz 862, 864). Lokietz, convicted of conspiracy to sell mislabeled foods, delivered the $6000 to defendant Kissel at the union office in Manhattan in the latter part of June 1964 (Lokietz 817-8, 820-1). Goldman feared that if his company did not pay there would be no contract and a strike, which Mr. Goldman opined, would put Merkel out of business (Goldman 787-8); aside from the risk of perishable products spoiling the company's general overhead of $50,000 a week would end Merkel's life (Goldman 787-8).

Fred Weinkauff, an officer of Fred Weinkauff, Inc., was a member of the Labor Negotiating Committee of the Meat Trade Institute and attended most of the negotiating sessions between the Institute and the union in April, May and June of 1964 (Weinkauff 683-6). Prior to one of the negotiating meetings at a Manhattan hotel, toward the latter half of the negotiating period, Harry White showed Weinkauff a list of people with amounts of money on it; Weinkauff's name was on the list and next to it the sum of $3000. White informed him that the list totalled $60,000, that his share was $3000, and that if the Institute members didn't pay they wouldn't get a contract. Sometime during the week in which June the 9th fell, Weinkauff gave $3000 to White at White's office on Reid Avenue in Brooklyn (Weinkauff 687-94; White 558-60); White subsequently delivered it to defendant Stuback at the same place (White 558-60).

At the time the money was given to White, Weinkauff was afraid of a strike, which could have resulted in the destruction of inventory, the loss of customers and the loss of money invested in his plant (Weinkauff 690-1). There was no agreement between Weinkauff and the defendants

that in exchange for the money, any special privilege would be accorded Weinkauff's firm on the new labor contract (Weinkauff 692).

Jerry Freirich, president of Julien Freirich Company, one of the smallest members of the Meat Trade Institute, was taken aside by White and Katz during a recess at one of the negotiating sessions between the Institute and the union in 1964 and told that the industry had to raise $60,000; he was informed that his share was $1500 and that Mr. Trunz would notify him of the arrangements made to pay the money (Freirich 704). Although unclear about whether he had been told that the union specifically had to have the money (Freirich 714), his "state of mind" was that it was to go to the union officials (Freirich 719-20). When Mr. Freirich said that he thought $1500 was a lot of money, Katz and White responded that others were paying more and that this was something that had to be done. Although displeased with "the entire situation," Freirich agreed to "go along with it" (Freirich 704-5).

In August of 1964, Trunz, at Muller's request, contacted Freirich, they met at a Howard Johnson's on Queens Boulevard, and Freirich turned over an envelope containing $1000 (Freirich 705-6). Trunz gave the money to defendant Muller the next day (Trunz 650-1, 672). Freirich's "state of mind" was that the money was to be paid to the union officials (Freirich 719-20). Freirich, who paid unwillingly but not out of fear, did not pay the money in order to receive any particular benefit in the contract (Freirich 721-2).

George Kern, president of George Kern, Inc., was a member of the Labor Negotiating Committee of the Meat

Trade Institute during the negotiations between the Institute and Local 174 in the early summer of 1964 (Kern 907-10). Early in the negotiations, at one of the negotiating meetings at a New York hotel, Fritz Katz told Kern that "there were expenses involved that it would be expensive." Kern replied that if it was not too costly it would be better than having a strike (Kern 913); at this juncture Kern, whose firm kept a sizable perishable inventory on hand, felt that payment was necessary to avoid a strike or other "reprisals" by the union (Kern 917, 919).

Thereafter, in the middle of June, Trunz called Kern and told him that his share was $2000 (Kern 914-15), and a week or so later Kern spoke again with Trunz and arranged to meet at a Manhattan restaurant, where a day or two following Kern gave him an envelope containing $2000 cash (Kern 916-17). Shortly thereafter, Trunz transmitted the cash to defendant Muller on Long Island (Trunz 652-3, 670-2).

In April, May and June of 1964 **John Krauss**, president of John Krauss, Inc., was a member of the Labor Negotiating Committee of the Meat Trade Institute and took part in the Institute's negotiations with Local 147 (Krauss 871-3). Sometime during the negotiations, during a recess at a negotiating committee meeting, Fritz Katz approached Krauss and Goldman and informed Krauss that the contract would cost him $3500 and Goldman $6000 (Krauss 874-5). Following this discussion, on June 18, 1964, Krauss told the treasurer of his firm, **Donald Timmons**, to get him $3500 and a few days later Timmons gave him the money in cash (Krauss 876-7; Timmons 892-9). This disburse-

ment was carried on the books of the corporation as "an employee's advance" (Timmons 892-7). Krauss put the money in a brown paper bag and delivered it to defendant Muller at his home on Long Island prior to the signing of the contract (Krauss 880, 890). At the time that Krauss told Timmons to get the money he wasn't afraid, but the money was paid so that nothing would happen, and they would get a contract (Krauss 880). He did not pay the money in order to receive a benefit on the contract (Krauss 884).

Leonard Horodenski was in 1964 the general manager of Nagel, Inc. and, as a member of the Labor Negotiating Committee of the Meat Trade Institute, took part in negotiations with Local 174 for a new labor contract (Horodenski 728-31). Toward the latter part of the negotiations Charles Trunz informed Horodenski over lunch in a restaurant in Long Island City that there would be a payment "towards the union for a contract" (Horodenski 731-2). At the end of July the defendant Muller called Horodenski and arranged to have lunch with him; a day or two later Horodenski and Muller met in Luchow's and Muller asked Horodenski whether he would be able to take care of "his obligation" (Horodenski 734-5). Horodenski said he would when he could get the money (Horodenski 735). Following this luncheon Horodenski inquired of Harry White what his share was and White informed him that it was $2000 (Horodenski 735-6).

Horodenski borrowed $2000 from a friend, **William Tynan**, and turned over the cash to defendant Muller at the union headquarters on East 18th Street in Manhattan prior to the signing of new contract (Horodenski 737-9, 744;

Tynan 766-7). At the time the money was paid Horodenski, whose firm had a large perishable inventory, was afraid of "possibly an interruption of business or labor harassment of some kind" or "a work stoppage or a slowdown or something" (Horodenski 745).

In August and October of 1964 Horodenski repaid Tynan with $1000 which Horodenski received from Thomas O'Dea, a vice-president in charge of sales for Nagel, Inc., and $1000 which Horodenski took from his own savings account (Horodenski 739-44; Tynan 765-7; O'Dea 754-7); the money was improperly carried on the books of Nagel as an expense (O'Dea 758-9).

Although the parties observed the orally agreed upon terms of the new contract following the expiration of the old on June 15, 1964 (Gevlin 394), the new agreement was not signed—a "formality" in the minds of some (Kern 931; Krauss 880, 890)—until August (Katz 476; Trunz 676-7).

Defendants Kissel and Muller attempt to persuade their victims not to testify

About 2 months prior to Charles Trunz's appearance before a New York County Grand Jury on June 20, 1967, he met with the defendant Muller, at the Muller's request, in a diner in Long Island (Trunz 657). At that encounter Muller explained to Trunz that "We have nothing to worry about if you guys don't talk." Muller went on to say that he was concerned that Katz might cooperate with the D.A., and requested Trunz to speak to Katz. When Trunz refused, Muller asked him what he was going to do and Trunz

replied that he was going to follow his attorney's advice. Muller became angry with this reply and the meeting broke up (Trunz 658). About 2 weeks after this meeting, Muller and Trunz met for lunch, again at Muller's suggestion, at the Blue Spruce Inn on Long Island. Muller again attempted to prevail on him to speak to Katz and again Trunz refused, saying that he was going to listen to his attorney (Trunz 658-9).

At a pension fund meeting in May of 1967, one month before he testified before a New York County grand jury, John Gevlin, who from newspaper accounts was aware of an investigation of Local 174, was asked by Kissel whether Lester Levy had been talking to Fritz Katz or anyone else. Gevlin replied that Levy had not told him that he had done so. Kissel informed Gevlin that he was going to deny everything and Gevlin responded that he thought he would do the same if he was in Kissel's shoes (Gevlin 368-72).

Prior to appearing before the grand jury and prior to speaking to any law enforcement officers, Harry White, aware from the newspapers of an investigation, happened upon Kissel at a restaurant in Hunts Point (White 563-4). Kissel told White that defendant Muller was not going to talk or turn State's evidence and that White should tell everybody else that they should not talk either (White 566). White responded that he would not do that, adding that Levy and Kern, being wealthy men, surely would not lie for anybody, nor would he (White 566-7).

Shortly after this encounter White saw defendant Kissel at a Manhattan restaurant near the union headquarters;

Kissel again told him to tell everybody to be quiet (White 567-8).

About a week or so after the second meeting, at a restaurant on Third Avenue, Kissel again told White to tell everybody to be quiet, and White responded as he had on the two prior occasions (White 568-9). Kissel suggested that White take an apartment in New Jersey in order to avoid having to testify (White 569).

On direct examination (Levy 295; Freirich 707; Horodenski 746; Kern 919) and on cross (Katz 496-7; Trunz 669; Freirich 712; Krauss 886; Kern 923; Weiler 951-2) the packers admitted that they had been granted immunity for their testimony. Krauss and Weiler also conceded that they had made no complaint to law enforcement authorities prior to receiving grand jury subpoenas in June of 1967 (Krauss 885-6; Weiler 952-2).

POINT I

The evidence at trial established the petitioners' guilt of conspiracy, extortion, and attempted extortion under the law of New York beyond a reasonable doubt.

The testimony of the principals of New York City pork processing firms and other evidence established beyond a reasonable doubt that during the course of negotiations for a new collective bargaining agreement in the spring and early summer of 1964, the defendants, officers of the Amalgamated Meat Cutters and Butchers Union, Local 174, conspired (count 1) to extort money from meat packers and actually did extort $40,000 from 9 of the packers (counts 2, 3, 5-7, 9-12).

Although conceding the payment of money to them by the meat packers, the defendants claim that there was no proof of unlawful threats or of payments made in fear; in their own words, defendants claim that there was no proof of unlawful threats, but that they "merely solicited a bribe * * * which the meat contractors agreed to pay." The evidence is otherwise.

After presenting a very "stiff" set of demands for a new collective bargaining agreement in April of 1964, the defendants informed management's representatives, the Labor Negotiating Committee of the Meat Trade Institute, the packers' trade association, that, contrary to prior practice, the old contract would not be extended beyond June 15, 1964, its expiration date, with the eventual settlement to be retroactive; a new contract would have to be agreed upon by the end of the old. Seemingly a legitimate bargaining strategy, this pressure tactic provided the setting for the defendants' illegitimate demand. They threatened the principal management representatives that if the industry did not deliver to them $60,000 prior to the signing of the contract, there would be no contract. These demands were revealed to Lester Levy (Plymouth Rock Provision Co.) and Fritz Katz (Stoll Packing Corp.) by defendants Kissel and Stuback at two bargaining sessions in early May, and were repeated by them at a New York Athletic Club meeting to Harry White (White Packing Co.), Charles Trunz (Trunz, Inc.) and Katz shortly thereafter. Defendants Muller and Kissel confirmed the demand to Levy and Trunz at Muller's home. There was to be no bargaining as to the amount demanded; when Levy and Trunz complained at Muller's home, Kissel replied, in

Muller's presence, "You can take your money and stick it up your ass," and when Katz protested at a bargaining session, Kissel responded, in Stuback's presence, "Stop chiseling; you get away cheap."

Adding insult to injury and revealing the careful planning of their extortionate scheme, Kissel and Stuback demanded at the Athletic Club meeting that one of their innocent victims become the bag man for their criminal enterprise by collecting the tribute from the industry and delivering it in one "lump" to the defendants. After protesting this arrangement, White, Trunz and Katz finally agreed that they would do the best they could. Thereupon, Stuback and Kissel scrutinized a list prepared by White and Katz at one of the Institute's Labor Committee meetings, which apportioned the $60,000 payment among the firms according to size; Stuback copied this list and then returned it. Levy was down for $6,000, Katz for $4,000, White for $4,000 and Trunz $6,000; Kissel later ordered Trunz to give more and Trunz delivered $7,000. Thereafter Katz, White and Trunz reported the defendants' threats to other pork producers, delineating the blood money expected from each; Theodore Weiler (Boar's Head Provision Co.) and Samuel Goldman (Merkel Inc.) were to turn over $6,000 each, George Kern (George Kern Inc.) and Leonard Horodenski (Wagel Inc.) $2,000 each and Fred Weinkauff (Fred Weinkauff Inc.) $3,000. Further, when Horodenski was tardy in delivering his tribute defendant Muller called him directly to reinforce the seriousness of his "obligation."

Understandably fearful of a strike, slowdown, work stoppage or other "reprisals," Levy—through his controller

Gevlin—and Katz, Weiler and Goldman—through Lokietz of Goldman's firm—made their payments to defendant Kissel. Similarly apprehensive, White and Weinkauff—through White—delivered their shares to defendant Stuback, while Trunz, Horodenski, and Kern—by Trunz—gave their allotments to defendant Muller.

As to two other packers (counts 4 and 8) the evidence established beyond a reasonable doubt that the defendants were guilty of attempted extortion. Although Jerry Freirich (Julien Freirich Co.) and John Krauss (Krauss Inc.) testified that they were not in fear at the time they paid their shares to defendant Muller—Freirich, through Trunz, $1,500, and Krauss, $3,500—it was established that Katz and White had at defendants' command informed them that the defendants had to be paid for the contract. Thus, the defendants with intent to extort had done acts tending to accomplish extortions but failing, by no fault of their own, to complete them [former Penal Law §2].

Despite the clearly sufficient proof of the defendants' guilt of extortion, they claim that as a matter of law none of their victims could have been in fear when they delivered the money to the defendants, because at the time of the payments the union membership and management had agreed to the terms of the contract and all that was left was the "formality" of printing and signing it. This is incorrect. Whether the victims paid because of fear was not a question of law but of fact [*People* v. *Diaguardi*, 8 N Y 2d 260 (1960)]; the issue was whether when payment was made the packers believed that the defendants could have unlawfully caused a strike or slowdown of some

sort, not whether such a strike was legally permissible or whether there was a binding contract in existence at the time. The jury had ample cause to believe the packers' apprehension. The defendants' message was unmistakable: pay or else. Since they were in control, the victims' legal rights were academic. Indeed, most extortions rest upon a threat of illegal acts. Had they not paid, the victims reasonably could have feared that the defendant union leaders would have found some fraudulent pretext for rejecting the printed contract and calling their men out, or some other mythical basis for initiating a slowdown [see, *Callanan* v. *United States*, 223 F.2d 171 (8th Cir. 1955) cited with approval in *People* v. *Dioguardi*, *supra* at 268]. In *Callanan* the defendants raised the analogous claim that since the record was barren of any proof that defendants had created labor troubles previously, there was no basis for the victims' fear. The court, quoting the government's brief, rejected this argument.

> "'* * * The issue in these cases is not so much the cause of the victims' fear as it is whether or not defendants played upon that fear * * * The issues determinative of guilt are whether the victim was fearful, whether that fear was reasonable, and whether the defendants made use of that fear'" [*id.* at 174].

Arguing that the jury's decision was against the weight of the evidence, the defendants also claim that the surreptitious fashion in which the extortion money was charged as company expenses by some of the packers, the failure of the victims voluntarily to complain, and the employers' requests for immunity before the grand jury prove that the defendants were guilty only of receiving a bribe from the eager employers. No federal question is pre-

sented. Moreover, it is patently absurd to argue that the meat packers bribed the defendants in order to procure a contract indistinguishable from that originally demanded by the union, which both union and management agreed was very tough on the employers. Further, the quiet juggling of books and reluctance to complain illustrated that, aside from tax motivations, the employers, who at the time of the investigation were still dealing with Local 174, were so successfully extorted that they were afraid to reveal what had happened. And the employers' requests for immunity were no confession of guilt of bribery, but the result of the careful advice of legal counsel fearful that the juggling of business records might incriminate them, or that persons, like the defendants, would accuse their clients of bribery despite an utter lack of foundation for such a claim. At any rate, these questions were fully explored at trial, and the jury reasonably resolved them against the defendants.

POINT II

Despite the prosecution's complete pre-trial disclosure of electronic surveillance, the record is devoid of any showing that this activity was not authorized by a legal court order or that it "tainted" the evidence at trial.

In response to defense motions to suppress evidence which was the fruit of illegal wiretapping or eavesdropping and for disclosure to the defense of any evidence so obtained, the trial prosecutor disclosed that during 1966 and 1967, over one year and a half after the events described in the indictment, wiretapping, pursuant to court orders, was conducted of the defendants' home telephones and cer-

tain lines to the union headquarters; the prosecutor stated unequivocally that none of the prosecution's case derived directly or indirectly from this activity. However, the dates and locations of all the wiretaps as well as the "plant" logs, tape recordings and transcripts of recordings were made available to the defense (38-44). Further, during trial, the prosecution disclosed that from September of 1964 through February of 1965, pursuant to court orders, wiretapping and eavesdropping had taken place on the premises of Merkel, Inc. and its officers. Again, although the trial assistant denied that the defendants had been overheard or monitored and disclaimed that any of the evidence in the present case had been the fruits of this activity, the prosecution made all its material relating thereto available to the defense (824-39). Supplementing this broad disclosure, the defense was permitted to conduct *voir dires*, out of the presence of the jury, of the People's witnesses for the purpose of determining whether their testimony had been procured through the use of electronic surveillance; all denied that their testimony was the fruit of such surveillance (Levy 353-6; Katz 522-9; White 575-88; Lokietz 839-58). Indeed, quite to the contrary, Norman Lokietz, an officer of Merkel, Inc., revealed during the course of his examination that it was from his disclosures, voluntarily made on the advice of counsel during an investigation of Merkel, that the district attorney's office learned of the defendants' successful extortion scheme (Lokietz 854-5).

Despite this complete disclosure by the prosecution and despite ample opportunity afforded the defense by the trial court to conduct whatever kind of hearing the defendants deemed necessary (54-6), there is no proof whatever in this

record that the evidence before the jury was the fruit of electronic surveillance. Indeed, the only factual basis offered for the claim that the prosecution's evidence was tainted is a remark by the trial prosecutor; defendants incorrectly deem this remark a concession that as a result of the electronic surveillance of the defendants the prosecution was able to follow them around and thus gain evidence in this case. However, a reading of the very passage relied on by the defendants to show "taint" discloses that the trial assistant specifically denied that observation of the defendants led to the evidence in this case (54-5). And this denial is quite understandable when it is recalled that the first wiretapping of the defendants' phones began over a year and a half after the extortion was completed.

As this Court noted in *Alderman* v. *United States*, 394 U.S. 165, 183 (1969), which mandated the disclosure procedure followed here,

> "The United States concedes that when an illegal search has come to light, it has the ultimate burden of persuasion to show that its evidence is untainted. But at the same time petitioners acknowledge that they must go forward with specific evidence demonstrating taint. '[T]he trial judge must give opportunity, however closely confined, to the accused to prove that a substantial portion of the case against him was a fruit of the poisonous tree. This leaves ample opportunity to the Government to convince the trial court that its proof had an independent origin.' "

Having failed to shoulder the burden placed upon them by nullifying the court orders underlying the surveillance and showing taint, the defendants may not claim to have been denied a fair trial.

POINT III

Petitioners were not deprived of a fair trial because of pre-trial publicity.

In a reply brief to the Appellate Division, but not in their main brief, petitioners claimed in one short paragraph that the trial court should have granted a pre-trial motion for a continuance of their trial because of "prejudicial publicity" in the "media." This contention, more an afterthought than a serious claim, is meritless.

The record (A 60-71) discloses that the newspaper stories—reporting a state investigation of the meat industry—claimed prejudicial mentioned neither petitioners nor the prosecutions pending against them. Thus viewed, *Sheppard v. Maxwell*, 384 U.S. 333 is clearly inapposite.

Conclusion

The application for a writ of certiorari should be denied.

Respectfully submitted,

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